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Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In Re Applications of	)	MM Docket No. 93-75
TRINITY BROADCASTING OF FLORIDA, INC.	)	BRCT-911001LY
For Renewal of License of Television Station WHFT(TV) Miami, Florida	)	
GLENDALE BROADCASTING COMPANY	)	BPCT-911227KE
For Construction Permit Miami, Florida	)	

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To: The Review Board

EXCEPTIONS TO INITIAL DECISION

TRINITY BROADCASTING OF FLORIDA, INC.

and

TRINITY BROADCASTING NETWORK

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SUMMARY

Trinity Broadcasting of Florida, Inc. ("TBF") and Trinity Broadcasting Network ("TBN") (collectively "Trinity") jointly file these Exceptions to the Initial Decision, FCC 95D-13, released November 6, 1995 ("ID") denying the license renewal application of TBF for Station WHFT(TV), Miami, Florida, and granting the competing application of Glendale Broadcasting Company ("Glendale").[1/]

Trinity Issues. The ALJ's disqualification of TBF turns entirely on an erroneous finding concerning the state of mind of Paul Crouch, the President of TBN and founder of National Minority T.V., Inc. ("NMTV"). Contrary to the ALJ's finding, Crouch did not found NMTV as a sham entity designed to take improper advantage of the FCC's minority preference and ownership policies. Nor did he intend to withhold or conceal from the FCC any relevant information about the relationship between TBN and NMTV. On both key points, the ALJ's decision is unsustainable, because the record, read fairly, clearly establishes that Crouch in good faith *believed* that NMTV was legitimate and *intended* full disclosure.

The FCC adopted minority incentive policies in 1983 and 1985 to increase minority ownership of broadcast media and encourage established broadcasters to actively assist minority-controlled licensees. After reviewing the new rules and the stated purpose of the policies, TBN's FCC counsel concluded, and so advised Crouch, that NMTV properly

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[1/] Style Notes: In these Exceptions, italicized and/or boldface words in quotations denote emphasis added. References to proposed findings and conclusions are to "F&C," and references to reply findings and conclusions are to "Rep F&C." Trinity exhibits and pleadings are denoted as "TBF," Mass Media Bureau as "MMB," Glendale as "GL," and SALAD as "SAL." The term NMTV is used to denote both National Minority T.V., Inc. and Television Translator, Inc. (as the corporation was originally named).

qualified as a minority-controlled entity under the policy because a majority of its Directors were minorities. He also advised that TBN could properly assist NMTV with financing, programming, and operating expertise, because that was the FCC's objective in allowing broadcasters to have cognizable interests in minority licensees.

Crouch was entitled to rely on that legal advice. There is no dispute that counsel gave that advice, and there is absolutely no evidence that he gave it in bad faith or thought it was incorrect. Nor was the advice unreasonable on its face, as the ALJ held. Counsel's interpretation of minority control under the LPTV preference policy was exactly what the FCC had said in 1983 (an interpretation with which the Mass Media Bureau agrees). Counsel's interpretation of the minority exception to the multiple ownership rules was exactly what one Commissioner had said when that policy was adopted in 1985. Moreover, counsel's interpretation was fully consistent with the rationale of the policy. Given that this was a new policy with no decisional precedents for guidance, and that the FCC itself acknowledges that *de facto* control is a complicated area of the law, Crouch cannot possibly be expected to have disregarded the legal advice of his counsel.

Further, Crouch genuinely believed that the minority Directors *did* control NMTV. On some very important matters the minority Directors outvoted him, with the result that one NMTV television station he did not want built *was* built and another that he wanted built was *not* built. This and other evidence, much of it ignored by the ALJ, both shows that the minority Directors had control and corroborates Crouch's *belief* that they controlled.

The evidence also thoroughly refutes the ALJ's inference that Crouch intended to conceal information from the FCC about the relationship between TBN and NMTV.

Promptly after Crouch formed NMTV in 1980, NMTV filed seventeen applications with the FCC each disclosing that TBN and NMTV had the same CEO (Crouch), a majority of common directors, and close programming and financial ties. Numerous other filings over the ensuing years reflected similar information, and also showed NMTV minority Director Jane Duff's ongoing association with TBN. Most importantly, it is undisputed that when NMTV first filed under the minority exception to the multiple ownership rules, its FCC counsel, consistent with Crouch's instruction that he provide all relevant information to the agency, discussed the application with senior FCC staff attorney Alan Glasser and *told* him that TBN would be *financing* NMTV, that TBN would supply NMTV's *programming*, and that TBN *employed* Duff. By well-established precedent, such disclosures negate any inference of an intent to conceal, as well as any inference that Crouch thought NMTV was a sham to be concealed.

In holding that TBN had *de facto* control of NMTV, the ALJ ignored a vast body of evidence and precedents on each relevant criterion which establish that TBN's relationship with NMTV was not *de facto* control.

In short, by any fair reading of the record Paul Crouch acted in good faith. He did not believe that NMTV was a sham, and he had no intent to conceal information or otherwise deceive or mislead the Commission about the relationship between TBN and NMTV. If mistakes were made, they were not the product of bad faith. Under these circumstances, disqualification of TBF would be completely unjustified. It would also treat TBF much more harshly than other licensees found in violation of policies that were unclear at the time. And the penalty of disqualification, far disproportionate to any errors

committed, would, in this case, violate the Religious Freedom Restoration Act, which permits only the "least restrictive" sanction needed to further a compelling governmental interest.

Glendale's Qualifications. The ALJ likewise blatantly erred in exonerating Glendale's principal, George Gardner, of serious misconduct while already under "heightened scrutiny" by the Commission for lack of candor in another proceeding. RKO General, Inc. (WAXY-FM), 5 FCC Rcd 642, 644 (1990). In the face of extensive incriminating evidence, the ALJ reached exculpatory conclusions that defy common sense and cannot survive any reasonable assessment of the record.

The record shows that in 1991 and again in 1992 Gardner's Raystay Company ("Raystay") filed a series of LPTV construction permit extension applications, signed by Gardner, that were clearly calculated to convey the false impression that Raystay intended to build the stations and was actively working toward construction. In truth, Gardner had decided that "there was no way I was going to go ahead" with construction, because without cable carriage for the four prospective LPTV stations he did not have a viable business plan. By his own admission under cross-examination, the lack of a business plan was the only reason why there had been no construction, and he filed for the extensions because he wanted to preserve the permits for possible sale. Indeed, Raystay was negotiating with prospective buyers, including Trinity, which formally offered to buy all of the unbuilt permits (until Gardner unilaterally terminated the negotiation).

None of this was disclosed in the extension applications. Instead, seeking to induce a grant, the applications falsely represented that "no other entity has expressed an interest

in providing this service," falsely claimed that Raystay had "entered into lease negotiations" with the site owners, falsely implied that a Raystay engineer had made an analysis of the sites in preparation for construction, and falsely stated that Raystay was in "continuing negotiations" with local cable systems. Although those representations were demonstrably false, and although the testimony of Gardner and other Raystay witnesses attempting to explain them away was not credible and even patently absurd, the ALJ chose to accept it at face value -- never even acknowledging the candor problem that has Gardner under "heightened scrutiny."

Gardner is directly and personally responsible for Raystay's lack of candor, because he was fully aware of most of the undisclosed facts that made the applications fundamentally deceitful. Specifically, contrary to the plainly conveyed impression that Raystay *would* construct if the extensions were granted, Gardner knew that Raystay had no workable plan and no present intent to construct. From the negotiations with prospective buyers, he also knew that other parties in fact *were* interested in the permits. Thus, not only did Gardner participate in the deception, he violated his pledge to the Commission in 1990 that he would personally ensure the truth and accuracy of any applications he filed. From this it is clear that Gardner is unfit to be a licensee, and Glendale must be disqualified.

If Glendale's application is not denied on that ground, financial and site availability issues, which the ALJ erroneously declined to add against Glendale, must be designated.

Accordingly, the ID should be reversed, TBF's application for renewal of license of WHFT(TV) should be granted, and Glendale's application should be denied.

I. STATEMENT OF THE CASE

Despite findings showing that TBF provides invaluable service to the Miami community (ID ¶¶142-205), the ALJ would end that service and impose the death penalty on WHFT for perceived misconduct by Paul Crouch and TBN. That draconian decision is totally unwarranted and far disproportionate to any errors committed. The record shows that Dr. Crouch acted in good faith under what he understood and was advised were the FCC's minority ownership rules and policies, and that NMTV indeed *has* given opportunities to minorities in broadcasting and served the minority community.

Applying a much more lenient standard to Trinity's opponent, the ALJ was inexplicably tolerant of serious misconduct committed under aggravated circumstances by Glendale's controlling principal, George Gardner. Even though the FCC placed Gardner under "heightened scrutiny" for prior lack of candor, the ALJ strained to exonerate him in the face of overwhelming evidence that he has since made *several more* false and misleading representations to the FCC. Beyond exonerating Gardner under the designated issues, the ALJ declined to add financial and site issues that were warranted.

II. QUESTIONS PRESENTED

1. Whether TBF should be disqualified when no intentional misconduct occurred?
2. Whether Glendale should be disqualified when its owner made misrepresentations and lacked candor while under heightened Commission scrutiny?
3. Whether financial and site issues should be designated against Glendale?

III. TBF QUALIFICATIONS ISSUES

The ALJ's disqualification of TBF rests entirely on two erroneous inferences he drew concerning Paul Crouch's state of mind: (a) that Crouch **believed** that TBN's relationship with NMTV made NMTV a sham; and (b) that he **intended** to conceal facts about that relation-

ship from the FCC. (ID ¶¶330-31) Those conclusions are manifestly unjust, because by any fair reading of the record that is not what Crouch thought or intended at all.[2/]

Dr. Crouch Did Not Believe NMTV Was a Sham. Crouch believed, justifiably, that TBN's involvement with NMTV was a *bona fide* arrangement that served the aims of the FCC's minority ownership policies. The ALJ misread it as abuse of process because he fundamentally misconstrued the minority policies, and thus simply could not see that Crouch acted in good faith in understanding those policies differently.

Two policies are involved. First, in 1983 the FCC adopted minority preferences for LPTV applications. Random Selection Lotteries, 93 FCC 2d 952 (1983) ("Lotteries"). The FCC's clear goal was to increase minority *ownership* regardless of operating control. Thus, control was expressly defined purely in terms of equity ownership, including *passive* equity (e.g., limited partnership and beneficial trust interests), so that entities in which minorities owned more than 50% of the equity could claim the preference even if the minority owners did not have control. The minority status of nonstock corporations was determined by "the composition of the board." Id. at 976-77. The FCC explained that the reason it was defining control solely in terms of equity ownership was that this should increase the number of entities eligible for the minority preference and would serve the intent of Congress that the Commission "evaluate ownership in terms of the beneficial owners." Id. at 976.[3/]

[2/] Also factually and legally wrong is the conclusion (ID ¶323) that NMTV was under the *de facto* control of TBN. (TBF F&C ¶¶590-649) In any event, a finding of *de facto* control does not merit disqualification if there was no intent to conceal relevant information. Silver Star Communications of Albany, 6 FCC Rcd 6905, 6907 (1991); TBF F&C ¶¶650, 669.

[3/] The FCC could not have stated the policy more clearly, and the Bureau agrees that ownership rather than control was determinative (MMB F&C ¶304). The ID (at n. 43) is demonstrably wrong in rejecting that position. The ALJ just ignored what the FCC said.

In 1985, the FCC went farther and amended the full power television multiple ownership rules to allow group owners to hold cognizable interests in two additional stations that are minority-controlled. Again addressing the question of how to define control, and noting that "different standards of minority control" applied for different purposes, the FCC said that the appropriate standard here would be "a greater than 50 percent minority ownership interest." Amendment of §73.3555, 100 FCC 2d 74, 95 (1985) ("§73.3555"). Thus, the rule stated: "***Minority-controlled*** means more than 50 percent ***owned*** by one or more members of a minority group." 47 C.F.R. §73.3555 (e)(3)(iii). This appeared to enact the same standard previously adopted for the minority LPTV preference, i.e., that ownership, not operating control, was determinative. Commissioner Patrick, dissenting, clearly articulated that interpretation of the policy in a separate statement not disputed by the majority:

> "Under the majority's scheme, the right to purchase broadcast stations over the established ceiling turns upon the race of the proposed owners alone. No further showing is required with respect to how these new owners may contribute to diversity. No concern is given as to whether the 51% minority owners ***will exert any influence*** on the station's programming ***or will have any control at all.***" 100 FCC 2d at 104.

The FCC plainly contemplated that group owners would be actively involved in the operations of minority licensees under such arrangements. In allowing broadcasters a "cognizable interest" in the minority entity (§73.3555(e)(1)), the FCC expected that they would contribute substantial "media expertise" as officers and directors.[4/] That was the goal.

[4/] Officers and directors are deemed to have a cognizable interest because such persons, especially those with media expertise, have "significant" ability to influence multiple licensees. Attribution of Ownership Interests, 97 FCC 2d 997, 1025, 1050-51 (1984).

The minority exception had its origin in a 1982 Advisory Committee Report prepared to explore "means to facilitate minority ownership of telecommunications properties."[5/] Finding that minority ownership was impeded by lack of financing, management, and technical expertise, the Report urged that the multiple ownership caps be raised for broadcasters who would provide those resources. Report, pp. 19, 32.[6/] The FCC said it would consider that recommendation as part of its general review of the multiple ownership rules (Minority Ownership, 92 FCC 2d at 853), and upon completing that review in 1985, it *did* raise the limits to enable broadcasters to contribute financing, expertise, and influence through cognizable interests in minority licensees. §73.3555, supra.

Before NMTV made any claim under these policies, it sought guidance and advice from its FCC counsel, Colby May. (TBF Ex. 101, pp. 28-30; Ex. 104, pp. 14, 17; Ex. 105, pp. 9-11, 13, 15; Tr. 1640, 1688-89, 2196, 2671-72, 3273-77) There is no dispute that May advised his client that NMTV legitimately qualified as a minority entity under these new rules and policies since more than half the directors were minorities. (ID ¶¶40, 57) Regarding the LPTV minority preference, May read Lotteries and premised his advice on the FCC's clear

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[5/] Minority Ownership in Broadcasting, 92 FCC 2d 849, 852 (1982) ("Minority Ownership"), citing Strategies for Advancing Minority Ownership Opportunities in Telecommunications (May 1982) ("Report").

[6/] The Report identified "engineering, law, accounting, finance, public relations" as areas of management and expertise that minorities required from group owners; urged such assistance "from the entry stage to an appreciable period of the business operation;" and proposed joint ventures in which group owners would provide financing, management, and technical assistance to minorities and would develop the broadcast properties. Id., pp. 18, 21-23, 31-32.

statement that the minority preference turned on beneficial ownership, and that minority ownership of nonstock corporations was based on the composition of the board. (TBF Ex. 105, pp. 9-10; Tr. 3273-74, 3277; TBF F&C ¶¶239-42) Regarding the multiple ownership exception, May read §73.3555 and premised his advice on (a) the definition of minority controlled as more than 50% minority owned, (b) Commissioner Patrick's statement confirming that equity ownership was dispositive regardless of working control, and (c) his understanding that, as held in Lotteries, ownership of a nonprofit entity like NMTV was dictated by the composition of the board.[7/] In May's words:

> "I looked to the board of directors as the locus of control and essentially the ownership of the companies, and that was the basis upon which I advised my client and made a determination that they were compliant." (Tr. 3604)

May also focused on the core element of the rule, namely that broadcasters could hold influential "cognizable interests." From this he concluded, and so advised his client, that TBN could provide financing and operating assistance to NMTV because the FCC's very purpose was to encourage broadcasters to help minority companies in those ways.[8/] As May put it:

> "[W]hat I advised these people about is this [is] a brand-new policy. The Commission is encouraging group owners to get involved with minority organizations. I felt that this, this National Minority was such an organization, that Trinity could become involved, and I did not see that involvement as being precluded or specifically limited in any area based upon what the Commission was trying to do." (Tr. 3205)

In short, counsel's advice was sought before NMTV filed any application with the FCC claiming a minority preference or the minority exception to the multiple ownership rules.

[7/] TBF Ex. 105, pp. 3-5, 9-10, 16; Tr. 3203, 3220-25, 3279, 3491-94, 3604, TBF F&C ¶¶231-32.

[8/] TBF Ex. 104, ¶33; Ex. 105, pp. 13-14; Tr. 3204-05, 3225, 3398; TBF F&C ¶¶227-33.

The applications were filed through counsel and only after he approved them.

Even though the Mass Media Bureau *shares* May's interpretation of the minority LPTV preference (n. 3 supra), the ALJ asserts that May's interpretation was wrong. (ID at n. 43) On this, it is plainly the ALJ who is wrong, since the FCC explicitly ruled that *passive* ownership interests qualified for the preference. Moreover, even if the ALJ were right and the Bureau wrong, TBN cannot be penalized for an incorrect interpretation of the rule when the agency itself is internally divided. As the Court of Appeals has recently stressed, regulations do not provide adequate notice "when different divisions of the enforcing agency disagree about their meaning." General Electric Co. v. U.S.E.P.A., 53 F. 3d 1324, 1332 (D.C. Cir. 1995). Since due process requires fair notice before drastic sanctions are imposed, and where, as here, "the agency itself struggles to provide a definitive reading of the regulatory requirements, a regulated party is not 'on notice' of the agency's ultimate interpretation of the regulations, and may not be punished." Id. at 1328-29, 1334.[9/] May's advice followed the policy announced in Lotteries as the agency's own Bureau construes it. The ALJ was wrong to disqualify TBF based on a different (and clearly mistaken) construction.[10/]

[9/] See also, Rollins Environmental Services v. U.S.E.P.A., 937 F.2d 649, 653, 654 (D.C. Cir. 1991) (when agency itself is uncertain of meaning of own rule and agency personnel construe rule differently, it is arbitrary to find rule clear, and no penalty should be imposed).

[10/] It also is pertinent that Jane Duff, not Crouch, certified NMTV's minority preference claims, and that before doing so she obtained May's advice *and* read the FCC application instructions for nonstock corporations, which clearly said, "*If a majority of the governing board...are minorities, the entity is entitled to a minority preference.*" (TBF Ex. 101, pp. 9-12, 28; TBF Ex. 105, pp. 9, 11; Tr. 1640, 2196) Since NMTV was a nonstock corporation and the majority of its Board were minorities, Duff believed it qualified for the preference and signed the certifications in absolute good faith. (Id.) The record does not remotely support the conclusion that NMTV made minority preference claims in bad faith.

Equally unfounded is the ALJ's assertion that May's advice on the minority multiple ownership exception was "unreasonable on its face" (ID ¶328). May's interpretation of the new rules and policy -- that control was defined simply as more than 50% *ownership* by minorities -- was exactly what Commissioner Patrick said was the rule, in an official statement issued when the rule was adopted and not disputed by the Commission majority.[11/] Moreover, May's interpretation was fully consistent both with the definition of minority control that the FCC had adopted for LPTV lottery preferences, and with the underlying rationale of the minority exception policy, which was to promote active assistance by established broadcasters to developing minority entities. The ALJ patently erred in choosing to ignore the policy rationale, ignore an FCC Commissioner's own interpretation of the rule, and find the very same interpretation by May "unreasonable on its face."[12/]

There is absolutely no evidence that May gave his advice in bad faith or believed that the advice was not correct. Even more to the point, there is no evidence that Crouch thought counsel's legal advice was incorrect. Nor was there any reason why Crouch *should* have

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[11/] The FCC has recognized that a statutory interpretation stated in a dissenting opinion uncontradicted by the majority is authoritative. See, Schedule of Fees, 50 FCC 2d 906, 907-08 (¶5) (1975).

[12/] While the ALJ refers to the FCC's "stated goal of promoting minority participation in the broadcast industry" (ID ¶328), he neither acknowledges *how* the FCC sought to achieve that goal nor addresses the core of the policy -- namely that broadcasters may hold cognizable interests and substantially influence station operations. He also incorrectly discounts (at n. 46) the vital importance of the Report as the seminal legislative history of the minority multiple ownership exception (see p. 4 supra). The FCC still relies on the Report in encouraging broadcasters to provide "substantial financial assistance" and "assistance with station operations and management" to increase minority ownership. Policies and Rules Regarding Minority and Female Ownership, 10 FCC Rcd 2788, 2791 n. 26, 2793 (1995).

believed that May's advice was wrong, much less "unreasonable on its face." Although a broadcaster, Crouch was not an attorney and had no legal expertise. If the pertinent legal issues were the FCC's minority incentive policies and the law of *de facto* control (as the HDO suggests), Crouch cannot possibly be expected to have disregarded his FCC counsel. The minority exception in §73.3555 was a new rule, implementing a new policy, under which broadcasters had no prior experience and no decisional precedents for guidance. The FCC acknowledges that *de facto* control is a "complex concept," Blue Ribbon Broadcasting, Inc., 90 FCC 2d 1023, 1025 (Rev. Bd. 1982), and an area of law in which "each case may present unique complexities," Transfers of Control of Certain Licensed Non-Stock Entities, 4 FCC Rcd 3403 (¶5) (1989). Reliance on specialized counsel is "particularly appropriate" in matters involving a "technical issue in a complex area of the law," even if it turns out that counsel wrongly interpreted the law. Fox Television Stations, Inc., 10 FCC Rcd 8452, 8500 (1995) ("Fox") (good faith reliance justified even though FCC found attorney's opinion re foreign ownership rule "somewhat remarkable"). Thus, Crouch was entirely justified in accepting the judgment of counsel who had FCC expertise and knew the relationship between TBN and NMTV.[13/] Even if May's view of the law is now ruled to have been wrong, Crouch (*not* a lawyer) could not possibly have known that at the time. "[I]t is what an applicant could be reasonably charged with knowing about the law and what it actually knew that inform our view of an applicant's intent and thus our view of its candor." Id., 10 FCC Rcd at 8486.

The ALJ gives no tenable reason for discrediting Crouch's reliance on counsel. His

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[13/] TBF Ex. 101, pp. 38-39; TBF Ex. 104, p. 17; TBF Ex. 105, pp. 15-16, 18; Tr. 3025, 3065, 3168, 3190-91, 3200, 3236, 3238, 3258, 3280-81, 3333, 3373-77, 3575; TBF F&C ¶227.

first reason -- and the very linchpin of his decision to disqualify TBF -- is that Crouch knew from the outset that NMTV was a sham, since NMTV was his own "brainchild" designed to "take advantage of the minority preference." (ID ¶332) Of course, it was entirely proper for Crouch to found a minority enterprise for that purpose, since FCC preferences are intended to give broadcasters such incentives.[14/] Moreover, the evidence refutes the conclusion that Crouch thought of the relationship between TBN and NMTV as a sham to be concealed from the FCC. Significantly, the *first* thing NMTV did after Crouch formed it in 1980 was to file *seventeen* LPTV applications, *each* reporting: (a) that Crouch was NMTV's Founder, President, and Director; (b) that two-thirds of NMTV's Board was comprised of Crouch and Duff, who then also comprised two-thirds of TBN's Board and were officers of various TBN stations; (c) that NMTV would rebroadcast TBN's signal; and (d) that TBN would finance NMTV's stations. (TBF Ex. 101, pp. 25-26 and Tabs L and M; TBF F&C ¶¶20-22) Plainly, a person who believes he has just created a sham in which Corporation A secretly controls Corporation B does not then promptly file 17 FCC applications openly showing not only that the two corporations have the same CEO and a majority of common directors, but that A will finance B and will furnish all of its programming. Those disclosures -- all made as NMTV's first order of business and before any question arose about the *bona fides* of NMTV -- are wholly inconsistent with the notion that Crouch considered NMTV a sham.

Also refuting any such inference is the strong testimony of Crouch, supported by documents, that he never contemplated controlling NMTV. (TBF Ex. 104, pp. 10-12, 16; Tr. 2486-87; TBF F&C ¶¶34-39) The evidence shows that from late 1979 to early 1981, he was

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[14/] Alexander S. Klein, 86 FCC 2d 423, 431-32 (1981), recon. denied, 88 FCC 2d 583 (1981).

focused on amending the Bylaws of TBN and TBN-controlled companies so that other directors could not remove him by majority vote without cause, but only for cause found after a formal proceeding. (TBF Ex. 104, p. 11; Tr. 2486; TBF F&C ¶¶34-39)[15/] Significantly, although NMTV was formed during that time, no such protection was written into NMTV's Bylaws because Crouch did not contemplate controlling NMTV.[16/] Thus, he has always been subject to removal *without cause* by majority vote of NMTV's Directors. A principal's vulnerability to removal by majority vote negates a conclusion that he intends to exercise improper control. BBC License Subsidiary L.P., 10 FCC Rcd 7926, 7932 (1995) ("BBC").[17/]

Moreover, the ALJ completely ignores clear evidence demonstrating that NMTV's minority purpose was in fact established when NMTV was created in 1980. Crouch at that time told Duff of the FCC proposal to help minorities get involved in low power television, and his idea to create a new company whose Board would be controlled by minorities. Duff

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[15/] See also TBF Ex. 101, pp. 7-9 and Tab E, pp. 8-9; TBF Ex. 104, Tab C, pp. 8-9; MMB/TBF Jt. Ex. 1, pp. 1-3 and Tabs A-E; Tr. 2495, 2497, 3815, 3863. Although the ID (at ¶16) fails to so recognize, the Bylaws of every TBN-controlled company preclude Crouch's removal simply by majority vote without cause. (TBF F&C ¶38 and n. 19)

[16/] TBF Ex. 101, pp. 6-7 and Tab D, p. 1; Ex. 102, pp. 15-16; Tr. 2486-87.

[17/] See also Payne Communications, Inc., 1 FCC Rcd 1052, 1054-55 (Rev. Bd. 1986) (removal power gives ability to control); Coastal Broadcasting Partners, 6 FCC Rcd 4242, 4253 (Rev. Bd. 1991) (same); WCVQ, Inc., 7 FCC Rcd 4849, 4852-53 (Rev. Bd. 1992), citing Coastal Broadcasting Partners, 7 FCC Rcd 1432, 1437, n. 8 (1992) (power to remove directors without cause constitutes control); TBF F&C ¶¶641-42. The ALJ dismisses all of this on the utterly illogical ground that Crouch did not need the same removal "protections" at NMTV because he already firmly controlled NMTV through Duff's presence on the Board. (ID at ¶308) That theory is wholly undercut by the fact that Duff had the *identical* relationship to TBN when TBN adopted the removal protections. Specifically, Duff and Crouch were two of three TBN Directors (a majority) when TBN protected Crouch, and two of three NMTV Directors (a majority) when NMTV did *not* protect him. (TBF Ex. 104, p. 9; MMB/TBF Jt. Ex. 1, p. 3; ID ¶39) If Crouch really did control Duff as the ALJ posits, he needed no more protection at TBN than at NMTV.

thereupon contacted Dr. Armando Ramirez and discussed with him NMTV's objective to help minorities participate in the communications media.[18/] Although both Duff and Ramirez recounted those discussions, the ALJ ignores them. He also ignores compelling evidence that NMTV took its minority purpose very seriously, including documentary evidence that Duff rejected Crouch's proposal to sell the Odessa construction permit because of the importance she saw "to establish minority controlled television as a success" so that NMTV would be a role model as a successful minority business and "not another minority organization that had failed;"[19/] her recommendation that NMTV hire James McClellan as Station Manager because she knew he had a special rapport with the minority community, a track record of frequently broadcasting minority-oriented programs, and experience producing such programs;[20/] her instructions to McClellan that he hire, train, and promote "people from [the] minority community" and "do minority programming for the minorities using minority people in dealing with minority issues;[21/] and NMTV's outstanding efforts to serve and assist minorities.[22/] All of this evidence shows that NMTV was not set up as

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[18/] TBF Ex. 101, pp. 23-24; TBF Ex. 103, p. 7; Tr. 4108-09, 4114; TBF F&C ¶¶17, 170; TBF Rep F&C ¶103.

[19/] TBF Ex. 101, Tab B, p. 1; Tr. 1733; TBF F&C ¶41; TBF Rep F&C ¶¶86-87.

[20/] TBF Ex. 101, p. 47; Ex. 106, p. 13; TBF F&C ¶79; TBF Rep F&C ¶88.

[21/] TBF Ex. 101, p. 48; Ex. 109, pp. 8-9; Tr. 4473-74; TBF F&C ¶80; TBF Rep F&C ¶89.

[22/] TBF Ex. 109, p. 16; Ex. 107, p. 202; Tr. 4420, 4473-75, 4481-85; TBF F&C ¶¶ 81, 130, 162, 188; TBF Rep F&C ¶¶ 23, 90). Besides ignoring what was *in* the record, the ALJ excluded as "irrelevant" most of the proffered evidence concerning NMTV's service to minorities. (Tr. 478) That is egregious error. A party charged with intentionally abusing FCC rules is plainly entitled to establish its good faith through evidence showing that it intended and acted to fulfill the purposes of those rules. It is astonishing that the ALJ would brand NMTV a sham without even listening to that evidence.

a sham.[23/]

Equally flawed are the other reasons why the ALJ rejected reliance on counsel. He asserts that Crouch's "alleged" reliance on counsel is "belied" by his awareness that NMTV's entitlement to the minority exception was uncertain. (ID ¶332) However, that is a complete *non sequitur*. As the Commission recognized in Fox, it is precisely when legal issues are uncertain that licensees are most justified in relying on advice of FCC counsel. The ALJ is also "dubious" because May's advice was given "orally" and "contained no analysis of the pertinent rule or its history." (ID, n. 48) But there being no dispute that the advice *was* in fact given, the ALJ's point is irrelevant. Attorneys routinely advise clients orally, and clients routinely rely on such advice. It would be absurd to hold that reliance on counsel will not be credited unless the advice was reduced to writing, and the FCC has never so held. For

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[23/] The ALJ badly misstates the record when, to support his holding that Crouch considered NMTV a sham, he finds it "significant" that "the issue of minority control was not discussed with FCC counsel at the time of [NMTV's] creation." (ID ¶¶ 21, 332) The evidence the ALJ cites (MMB Ex. 6, Tr. 3988-89) relates to communications that FCC counsel had with TBN's corporate counsel Norman Juggert, *not* with Crouch or anyone else. At the time of those communications, Juggert already knew that minorities Duff and Espinoza would comprise the majority of NMTV's Board, understood that NMTV therefore would be minority controlled, and was "well aware" of NMTV's minority focus "*through Paul Crouch*." (Tr. 2483, 3673-78, 3688-89, 3855, 3989) It is hardly significant that Juggert did not raise with FCC counsel something he already knew, and the fact that Juggert did not do so hardly justifies the conclusion that *Crouch* thought NMTV was a sham. Moreover, the reason Juggert did not discuss NMTV's minority purpose with FCC counsel was not at all sinister, as the ALJ rashly concludes; Juggert was then preparing NMTV's application for tax exemption and thus was focused on IRS rather than FCC considerations. (Tr. 3758-63, 3880-81) Likewise, in finding it significant that the articles of incorporation did not state that NMTV would be minority owned (ID ¶¶21, 306), the ALJ ignores Juggert's clear and compelling explanation that he drafted the articles in exactly the form recommended by the California Bar for religious corporations because California's attorney general was aggressively challenging the exemptions of nonprofits whose articles went beyond the form. (Tr. 3759-63, 3882-85) Thus, the points made by the ALJ are fully answered in the record and do not begin to show that Crouch thought NMTV was a sham.

the same reason, it is immaterial whether May recited all of his underlying analysis when he advised the client of his legal conclusion. There is no question that he *made* such an analysis (TBF Ex. 105, ¶¶15-16, 22-25), and he did in fact explain the FCC's policy rationale to Crouch (Tr. 3202; TBF Ex. 104, ¶33). In sum, therefore, the ALJ plainly erred in discounting the reliance of TBN and NMTV on their counsel. Given that (a) TBN and NMTV sought the advice of counsel, (b) counsel advised that NMTV qualified as a legitimate minority entity, and (c) NMTV claimed no minority preferences until it received that legal advice, there is simply no basis for finding that Crouch proceeded in bad faith.[24/]

Contrary to the ALJ's finding, Crouch did *not* think NMTV was a sham. When NMTV filed applications under the FCC's minority incentive policies, he was of the understanding that ownership of nonprofit corporations meant membership on the Board and that majority membership on the Board constituted control. (Tr. 2451; TBF Ex. 104, p. 13) He also believed that each NMTV Director had the unfettered right to vote his/her own judgment, and expected each to speak his/her mind. (TBF Ex. 104, p. 12; Ex. 106, p. 3) His belief that this was a *bona fide* functioning board is supported by substantial evidence. Against his wishes, minority Board members Duff and Espinoza insisted that NMTV build the Odessa station so that minority ownership would not fail.[25/] Likewise, Duff and

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[24/] The two cases cited by the ALJ are inapposite. RKO General, Inc. (KFRC), 5 FCC Rcd 3222, 3224 (1990), was not a case of reliance on counsel; the applicant was faulted for making no effort to determine whether its actions were proper. In Algreg Cellular Engineering, 9 FCC Rcd 5098, 5142-43 (Rev. Bd. 1994), reliance on counsel was no defense because the Board essentially found that the licensees knew they were violating the rules.

[25/] TBF Ex. 101, pp. 3-4 and Tab B, p.1; Ex. 104, p. 12; Ex. 106, p. 9; Tr. 1732-34, 2383-34, 2723, 4226; TBF F&C ¶¶40-43.